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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 376

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 39–53) is reported at 331 F. 2d 99. The Board's Decision and Order (B.A. 7a–25a)[1] are reported at 142 NLRB 1132.

JURISDICTION

The decree of the court of appeals was entered on May 15, 1964 (Pet. 54–55). The petition for a writ of certiorari was filed on August 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "B.A." refers to the Board's appendix in the court below, which has been filed with the petition.

QUESTION PRESENTED

Section 8(b)(7)(C) of the National Labor Relations Act makes it an unfair labor practice for a labor organization that is not currently certified as the representative of the employees to picket an employer with an object of requiring him to recognize or bargain with it, for more than a reasonable time (not to exceed 30 days) after the commencement of such picketing, unless within such period a petition for a representation election is filed with the Board. The question presented is whether, in the circumstances of this case, the petitioner Union's picketing violated that Section.

STATUTE INVOLVED

Certain relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are reprinted in the petition at pp. 31–38. In addition, the whole of Section 8(b)(7) is set forth below:

> SECTION 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organi-

zation is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

STATEMENT

From May 1, 1952 to April 30, 1961, the petitioning Union was party to a series of individual collective bargaining agreements with R. S. Noonan, Inc. ("Noonan") (Pet. 40; B.A. 154a, 172a, 190a). Noonan is a general contractor in the building and construction industry in Pennsylvania and several other states (Pet. 40; B.A. 28a, 71a–77a). During the time relevant here, Noonan was operating at four construction sites in York County, Pennsylvania (Pet. 40–41; B.A. 42a–43a, 72a, 74a–75a, 81a). In accordance with its usual practice, Noonan reserved only a certain portion of the work on these projects for performance by its own employees and subcontracted the remainder to various subcontractors (Pet. 41; B.A. 14a, 43a, 48a).

The last individual collective bargaining agreement between Noonan and petitioner, which expired on April 30, 1961, covered 29 counties in Pennsylvania, including York County (Pet. 40; B.A. 190a–191a). Under this agreement, Noonan recognized petitioner "as the collective bargaining agent for all persons performing work within the [mechanical] jurisdiction of the Union," *i.e.*, operating engineers (Pet. 40; B.A. 191a).[2] Since 1957, however, Noonan had not had any

[2] Noonan, as a member of the General Building and Contractors Association of Philadelphia, was also party to a multi-employer agreement giving petitioner similar recognition as collective bargaining agent for operating engineers employed within a 5-county area around Philadelphia, Pennsylvania, which did not include York County. This agreement did not expire until April 30, 1963 and was thus in effect during the period relevant here (Pet. 40; B.A. 39a, 125a–126a).

such employees on its payroll (Pet. 41; B.A. 29a–30a, 37a–38a, 48a–49a, 57a–58a, 69a). Whenever in recent years the need for operating engineers had arisen on its various construction projects, Noonan had subcontracted the work (B.A. 37a–38a, 48a–49a).

In these circumstances, petitioner was not then certified as the representative of any of Noonan's employees. Those employees were members of other labor organizations in the building trades field with which Noonan has collective bargaining agreements (Pet. 41; B.A. 49a).

In the latter part of April 1962, approximately a year after expiration of the last individual agreement between Noonan and petitioner, Union representatives met with Noonan's president in an effort to get Noonan to sign a new agreement for the 29-county area, including York (Pet. 40; B.A. 30a–34a). Noonan refused to do so and, on approximately May 1, 1962, petitioner began to picket Noonan at its four construction sites in York County (Pet. 41; B.A. 27a–28a, 42a–43a). The picket signs, which originally stated, "R. S. Noonan, Inc., Unfair to Operating Engineers Local 542," were later changed to read: "Dispute between R. S. Noonan, Inc., and Operating Engineers Local 542" (Pet. 41; B.A. 43a).

The picketing had the following effects: (1) at one construction project, truckers delivering reinforcing steel refused to cross the picket line, as did employees hired by a subcontractor to install the reinforcing steel (Pet. 47, n. 9; B.A. 44a–45a); (2) at another project, employees of all crafts, including employees of Noonan's subcontractors, refused to cross the picket

line and remained off the job until the picketing was enjoined on June 27 (Pet. 47, n. 9; B.A. 45a–46a); (3) at a third project, employees of the prime contractors refused to cross the line (Pet. 47, n. 9; B.A. 46a–47a); and (4) at a fourth, both employees of prime contractors and of Noonan's subcontractors refused to cross the picket line for three days (Pet. 47, n. 9; B.A. 47a–48a).[3]

On May 16, 1962, Noonan filed a petition for a representation election with the Board (Pet. 41; B.A. 83a). The petition recited that the Union had made a request for recognition in a unit of "[all] operating engineers," that there were no employees in the unit, and that Noonan had declined recognition (Pet. 41–42; B.A. 83a–85a). On June 12, the Board's Regional Director approved withdrawal of this petition upon Noonan's request (Pet. 42; B.A. 86a–87a).[4]

On May 16, 1962, Noonan filed unfair labor practice charges, amended on May 17 and 25, alleging that petitioner's picketing violated Section 8(b)(7)(C) of the Act (Pet. 41; B.A. 71a, 78a, 80a).[5] The Board

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[3] After the first three days of picketing on projects (2) and (4) above, separate gates were opened for two prime contractors there. On subsequent days, the employees of those contractors and others doing business with them used the new gates. But the picketing continued at the other entrances, which were used by Noonan and its subcontractors (B.A. 55a–56a).

[4] The Regional Director would have dismissed the petition, in any event, because Noonan employed no operating engineers among whom a representation election could have been conducted (Pet. 49; B.A. 27a).

[5] On June 11, 1962, the Board's Regional Director, pursuant to Section 10(l) of the Act, filed a petition in the United States District Court for the Middle District of Pennsylvania, to en-

found (B.A. 6a–11a, 17a–22a) that an object of the Union's picketing was to force or require Noonan to recognize or bargain with the Union, although it was not the certified representative of the employees in question; that this picketing had continued for more than 30 days without an operative representation petition having been filed; and that the picketing thus violated Section 8(b)(7)(C) of the Act. The Board's order requires the Union to cease and desist its illegal picketing, and to post appropriate notices (B.A. 11a, 23a–25a).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. 39–53).

ARGUMENT

Section 8(b)(7)(C) of the Act, added in 1959, makes it an unfair labor practice for a union, unless it is "currently certified as the representative" of the employees, to picket an employer for recognitional or organizational purposes for more than a reasonable period of time (not to exceed 30 days), without a representation petition having been filed with the Board. If such petition is filed within that period, the first proviso to Section 8(b)(7)(C) provides that the Board "shall forthwith * * * direct an election in such unit as the Board finds to be appropriate and shall certify the re-

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join petitioner's picketing pending a final adjudicaton of the unfair labor practice charges by the Board. On June 27, 1962, the district court granted the injunction (Pet. 42). *Schauffler v. Local 542, International Union of Operating Engineers, AFL–CIO*, Civil No. 7738, 50 LRRM 2691. Petitioner's appeal from the district court's order was dismissed by the court of appeals for mootness on August 7, 1963 (Pet. 42, n. 3).

sult thereof." The second proviso to Section 8(b)(7)(C) exempts from its requirements certain informational picketing, unless such picketing has "an effect" on deliveries or the performance of services at the picketed premises. The court of appeals correctly concluded that petitioner's picketing of Noonan violated Section 8(b)(7)(C). There is no conflict of decisions and no occasion for further review.

1. Petitioner contends (Pet. 9–15) that its picketing was not to compel Noonan to sign a recognition agreement, but merely to advise the public that Noonan was not living up to a collective bargaining agreement that it already had with the Union. However, both the Board and the court below found (Pet. 40, 45; B.A. 16a) that, at the time of the picketing, Noonan had no collective bargaining agreement with the Union covering the area involved—the last individual agreement between Noonan and the Union for the 29-county area, including York, having expired approximately a year before the events here took place.

Petitioner's attempts to imply a continuation of the recognition accorded in that agreement are unavailing. The fact that the employer has granted recognition to a union in a collective bargaining agreement obviously does not vest the union with a right to represent the employees involved for all time—even after the contract has long expired and the employees are no longer working for that employer.*

* As the court below noted, *Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (C.A. 2), upon which petitioner relies (Pet. 11), "deals not with the survival of union recognition after the expiration of a

Nor may petitioner derive support from the unexpired multi-employer agreement to which Noonan was a party; the terms of that agreement were specifically limited to the 5-county area around Philadelphia—an area not involved in the dispute here (n. 2, p. 4, *supra*).[7] Similarly, Noonan's continued monthly reports to the Union's pension and welfare funds do not show a continuation of the contractual relationship for the 29-county area, including York. These reports were also required by the unexpired multi-employer agreement for the Philadelphia area, and, according to the official of Noonan who made the reports, they were filed solely in conformity with that agreement, following expiration of the last York agreement in April 1961 (Pet. 45–46; B.A. 62a–64a).[8]

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bargaining agreement * * * [but] with the survival of rights vested in employees, such as seniority, where the employer transferred his plant to another city" (Pet. 45).

[7] Contrary to petitioner, the specification in the multi-employer agreement of "the eastern half of Pennsylvania and the State of Delaware" (B.A. 126a) as the "territorial jurisdiction" of the Union does not constitute recognition of petitioner as the collective bargaining representative of all operating engineers employed within that area. The previous individual agreements between Noonan and petitioner, covering York County, also specified the eastern half of Pennsylvania and the State of Delaware as the territorial jurisdiction of petitioner (B.A. 154a–155a, 172a, 190a). As the court below noted (Pet. 44), the second sentence of the coverage clause in the multi-employer agreement "obviously limits the effect of the agreement to work performed in five counties of the State of Pennsylvania contained within the territorial jurisdiction of the Union," i.e., Philadelphia, Delaware, Bucks, Chester and Montgomery Counties.

[8] Nor is there any substance to petitioner's contention (Pet. 13–15) that its picketing, even if for a recognitional object, was purely informational and thus protected by the second proviso to Section 8(b)(7)(C). First, the picket signs themselves

2. Emphasizing the words "his employees" in the portion of Section 8(b)(7) which limits the Section to picketing for certain objectives,[9] petitioner contends (Pet. 15–18) that the Section is applicable only where the employment is then in existence, and not where, as here, it is, at most, merely prospective. There is no substance to this contention. The words "his employees" may properly be read as encompassing prospective as well as existing employees,[10] and such reading effectuates the overall purpose of Section 8(b)(7). On the other hand, as the court below pointed out (Pet. 52), petitioner's interpretation would be out of harmony with that purpose.

The basic purpose of Section 8(b)(7) is to place a limit on the use of a picket line for recognitional or organizational purposes, and the limitations of the provision have been deemed applicable, not only where the union represents none or only a minority of the employees, but even where it in fact represents

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were not in the form contemplated by the proviso. Originally, they simply charged Noonan with being "[u]nfair" to petitioner; later, they were changed to read "Dispute between R. S. Noonan, Inc. and Operating Engineers, Local 542" (Pet. 41; B.A. 42a–43a). Moreover, the proviso is not applicable where the picketing has a substantial effect on deliveries, and there is ample basis in the record for the finding of the Board (B.A. 21a), approved by the court below (Pet. 47, n. 9), that the stoppages here were substantial.

[9] The provision proscribes picketing "where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees * * *."

[10] Cf *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177.

a majority.[11] Picketing to force recognition before any employees are hired offends this statutory scheme no less, and perhaps even more, than does picketing to attain such objective where some or all of the employees are already on the job.[12]

To construe Section 8(b)(7) as applicable to prehire recognitional picketing does not, as petitioner suggests (Pet. 18–24), run contrary to Section 8(f) of the Act. Although the latter Section validates the voluntary execution of prehire agreements in the building and construction industry, its legislative history makes clear that it was not intended to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign such an agreement. See 104 Cong. Rec. 11308; 105 Cong. Rec. 18128, II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1715 (G.P.O.,

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[11] See *Dayton Typographical Union No. 57* v. *National Labor Relations Board*, 328 F. 2d 634 (C.A.D.C.); *International Hod Carriers, Local 840 (Blinne Construction Co.)*, 135 NLRB 1153.

[12] *McLeod* v. *Local 140*, 207 F. Supp. 525 (S.D.N.Y.), cited by petitioner (Pet. 16), is clearly inapposite. There, the picketing was found to have no recognitional objective because the picketers were manufacturing employees seeking the return of their jobs and the employer whom they picketed had no manufacturing plant within the jurisdiction of the union local that represented them. Cf. *Local 705, Teamsters* v. *National Labor Relations Board*, 307 F. 2d 197 (C.A.D.C.), where the picketing was found violative of Section 8(b)(7)(C) because its object was to force an employer to discharge current employees, hire members of the union who were not then employed, and recognize the union as their representative. See, also, *Sperry* v. *Local Union No. 562, Plumbers*, 210 F. Supp. 743 (W.D. Mo.).

1959); H. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 42, I Legislative History, *op cit. supra*, p. 946. See, also, *National Labor Relations Board* v. *International Hod Carriers, Local No. 1140*, 285 F. 2d 397, 403 (C.A. 8); *Sperry* v. *Local Union No. 562, Plumbers*, 210 F. Supp. 743, 747–748 (W.D. Mo.).[13]

3. Finally, there is no merit to petitioner's contention that the representation petition, filed and subsequently withdrawn by Noonan, tolled the ban of Section 8(b)(7)(C) (Pet. 24–27). Section 8(b)(7)(C) provides that picketing for recognitional purposes is unlawful if it "has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from [its] commencement"; if such a petition is filed, the first proviso to Section 8(b)(7)(C) (p. 3, *supra*) requires the Board to direct an expedited election and to certify the results thereof. The two provisions together show that Congress' intention was to prohibit recognitional picketing after a reasonable period of time not to exceed 30 days, unless steps had been taken within that period to have the underlying representation question resolved by the Board's election procedures; if such steps were taken, the picketing could continue pending the completion of the election procedures (which, in

[13] This limitation on the Union's picketing is not, as petitioner asserts (Pet. 21), an implied one, derived from the failure of Section 8(f) to *authorize* such picketing, but an explicit one, apparent in the prohibitions of Section 8(b)(7). Consequently, there is no occasion for invoking the principle that a ban on peaceful picketing will not be found absent a specific, and carefully delineated prohibition.

order to avoid an undue prolongation of the picketing, were expedited).[14] It follows, as the Board and the court below concluded (Pet. 49–50; B.A. 7a, n. 2), that the mere filing of a timely representation petition is not enough to suspend the limitation of Section 8(b)(7)(C); only such a petition as is capable of furnishing the basis for a representation election can do so.[15] The petition filed by Noonan could not have served as the basis for an election. For since Noonan had not employed operating engineers since 1957, it had no employees who could have voted in the election. Noonan withdrew the petition, presumably because it would otherwise have been dismissed by the Board's Regional Director on that ground (see n. 4, p. 6, *supra*).[16] The Board thus properly held that the Noonan petition was not an operative one for purposes of Section 8(b)(7)(C).

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[14] If the union won the election and were certified, it could continue recognitional picketing indefinitely, by virtue of the specific exemption in Section 8(b)(7) for a "labor organization which is currently certified as the representative of [the] employees." On the other hand, if the union lost the election, continued cognitional picketing would be barred under Section 8(b)(7)(B), which prohibits such picketing "where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted." See *International Hod Carriers, Local 840 (Blinne Construction Co.)*, 135 NLRB 1153, 1156–1159.

[15] See *Chicago Printing Pressmen's Union (Moore Laminating, Inc.)*, 137 NLRB 729.

[16] *Trammell Construction Company*, 126 NLRB 1365, cited by petitioner (Pet. 25–26), is distinguishable, for the employer there had a nucleus of five regular employees and clearly intended to hire more in the future.

CONCLUSION

For the reasons stated above, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

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